Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1989

(CASE #89-976)

EMERSON SUTTON

Petitioner

vs.

United States Department of Housing & Urban Development; Kenneth D. Lange; Charles H. Hopkins; Secretary of Housing and Urban Development(Appendix Page); William Krueger, Auditor with the Inspector General's Office of HUD (T.PH.P.54) Pursuant to Rule 19 and 21 F.R.C.P.

Respondent

SUPPLEMENTAL BRIEF (REF S CT Rule 22.6)

To the United States Court of Appeals

For the Eight Circuit

Emerson Sutton, Petitioner
2141 Yale
Maplewood, Missouri 63143
(314) 781-2222

THE QUESTION PRESENTED

Under U.S. Supreme Court Rule 22.6, the refusal of this Court to review Federal Statute 42 USC §3535(d) and other questions of law presented in the Petition for Certiorari and/or this Supplemental Brief, which quotes the U.S. Supreme Court cases of FW/PBS, Inc v Dallas (No 87-2012) and University of Pennyslvania v E.E.O.C. (No. 88-493), DECIDED IN JANUARY 1990, would be an obvious miscarriage of justice. Said refusal to review the lower courts decisions would be inconsistent with substantial justice, in direct conflict with cited legislation and case law and is so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this courts power of supervision.

U.S. Supreme Ct Rule 22.6; Federal Rules of Evidence, Rule 103(a)(1) 28 USCA; Fed Rules Civil Pro. Rules 46, 61, 28 USCA; Hormel v Helvering 312 U.S. 552, 556-557 (1941) under Mo S Ct Rule 3.27; Martinez v Mathews 544 F2d 1233 Note 4 (5th Cir 1976) Carlson v Green 100 S Ct 1468, 1469 Notes 1, 2 & 6 (1980).

TABLE OF CONTENTS

PAGE

Supplemental Brief
Cover Sheet.....ante - 1

Questions Presented.....ante - 3

Table of Contents.....ante - 5

Table of Authorities.....ante - 6

Further Jurisdictional Statement.... 1

Supplemental Brief.....3 - 10

Petitioner's Affidavit of Service of
Supplement Brief to the Respondent's
of the Petition For
Certiorari.....Apx 1

TABLE OF AUTHORITIES

Page

Alcoa Steamship Co. v Federal Martime Commission 348 F2d 756 Note 2 (D.C.Cir 1965).....5

Carlson v Green 100 S Ct 1469 Note 1, 2 & 6 (1980).....Ante-4

Cleveland Board of Education v Loudermill 470 U.S. 532, 533 (1985).....5,22

66 Corpus Juris Secundum Notice Sec. 14,P. 652.....10

Davis v Rodney 490 F2d 1360, 1362 (3rd Cir 1974).....2

Federal Rules of Evidence, Rule 103 (A)(1) 28 USCA.....Ante-4

Federal Rules Civil Procedures, Rule 103 46, 61, 28 USCA.....Ante-4

FW/PBS Inc. v Dallas (No. 87-2012) decided by the U.S. Supreme Court in January 1990.....Ante-3,1,4,9

Hoppe, Inc. v St. Louis Public Service Co 361 Mo 402, 235 S.W. 2d 347 (Mo En Banc 1951).....10

Hormel v Helvering 312 U.S. 552, 556-557 (1941).....Ante-4

Independent Meat Packers Association v Butz 526 F2d 228, 239 Note 30 (8th Cir 1975)

Certi. Denied 42 & U.S. 966.....6,8

In re Lewis 845 F2d 624, 625, 635.....7
Note 10 (6th Cir 1988) Rehearing
and Rehearing En Banc Denied
6-29-88.....7

Kolender v Lawson 461 U.S.
352 (1983).....9

Mar v Kleppe 520 F2d 867,
868 (10th Cir 1975).....2

Martinez v Mathews 544 F2d 1233
Note 4 (5th Cir 1976).....Ante-4

Missouri Supreme Court
Rule 3.27.....Ante-4

Missouri Teacher Tenure Act V.A.M.
S. 168.104 (OP. ATTY. GEN. NO. 233,
Holliday 10-24-72).....8,9

Morton v Ruiz 94 S Ct. 1055,
1056 Note 7 (1974).....4

In re Ruffalo 390 U.S. 543,
550 (1968).....6,8

Schware v Board of Bar Examiners
353 U.S. 232 Notes A&D (1957).....5

Standard Airlines v Civil
Aeronautics Board 177 F2d 18,
20 Notes 2 & 3 (D.C. Cir 1949).....9

Stirone v U.S. 361 U.S. 212.....6,8

University of Pennyslvania v E.E.O.C.
Decided by the U.S. Supreme Court in
January 1990.....Ante-3,1,3,4,7,8

U.S. Supreme Court Rule 22.6...Ante-4,1

(T = Transcript; PH = Preliminary Hearing; TR = Trial; L.F. = Legal Files; P Ex = Plaintiff's Exhibit; Apx = Appendix)

ADDITIONAL JURISDICTIONAL STATEMENT

This Supplemental Brief is invoked per the provisions of U.S. Supreme Court Rule 22.6 in which petitioner wishes to call the Court's attention to its January 1990 rulings, in the new cases of FW/PBS, Inc. v Dallas (No. 87-2012) and University of Pennsylvania v E.E.O.C (No. 88-493), which were not available at the time of Petitioner's filing of his Petition for Certiorari on December 18, 1989, and other cases and legislation which support said rulings.

Additional Jurisdiction of the District Court was invoked under 24 CFR 200.210 (Ref Pet for Cert-Apx p B14); 12 USC S1709 (Pet. for Cert.-Apx p B6);

28 USC S1331 (Petitioner's "Legal File" to the 8th Cir C.A. filed 11-1-88); 28 USC S1346 (Ref Pet. for Cert., Apx p B10) per Mar v Kleppe 520 F2d 867, 868 (10th Cir 1975) Davis v Romney 490 F2d 1360, 1362 (3rd Cir 1974).

The Waiver of HUD'S sovereign immunity to suit on page 3 of the Petition for Certiorari is properly identified as 12 U.S.C. §1702.

Additional jurisdiction of this court is invoked by the District Court's jurisdiction listed in the Petition for Certiorari, the District Court's jurisdiction above and US S Ct Rule 17; 42 USC S1441; 28 USC S1254(3); 5 USCA S551(4); S553; S706(2)(a); 11 USCA S362(a), S525, and S1107; Diversity Action Jurisdiction F.R.C.P. Rule 4(e), 28 USCA; Rule 4(d)(7), 28 USC (1976 Ed) per the liberal amendment provision of

28 USC S1653 and other provisions or authorities that this Court deems just, proper and equitable.

SUPPLEMENTAL BRIEF

The District Court's ruling that "THE COURT HAS DETERMINED THAT THE EVIDENCE OVERWHELMINGLY SHOWS THAT DEFENDANTS' ACTIONS WERE BASED ON FACTORS OTHER THAN PLAINTIFF'S RACE" (Pet. for Cert., Apx p B11-B12) is in direct conflict with and is so far departed from the accepted and usual course of judicial proceeding expounded in the January 1990 United States Supreme Court case of University of Pennsylvania v E.E.D.C (No. 88-493), as to call for the exercise of this Court's power of supervision.

The District Court's "ALLEGED" evidence was the respondent(s) attempt

at verbal justification of the "AD HOC" meeting referred to on Apx p B9 of the Pet. for Cert. (T. TR 10-11), which is UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL as required in University of Pennvs.

"No matter how rational or consistent congressional intent a particular administrative decision with the respect to dispensing of government benefits may be, determination of eligibility cannot be made on an AD HOC basis" (Pet. for Cert.-Apx p A12, A20, B9) Morton v Ruiz 94 S Ct 1055, 1056, Note 7 (1974) FW/PBS Inc. v Dallas (No. 87-2012) decided by the U.S. Supreme Court in January 1990.

"WHERE CONGRESS HAS CONSISTENTLY MAKE EXPRESS ITS DELEGATION OF PARTICULAR POWER, ITS SILENCE IN PARTICULAR STATUTE IS STRONG EVIDENCE

THAT IT DID NOT INTENT TO GRANT THAT POWER" Alocoa Steamship Company v Federal Maritime Commission 348 F2d 756 Note 2 (D.C. Cir 1965).

"WHETHER THE PRACTICE OF LAW IS A 'RIGHT' OR A 'PRIVILEGE' NEED NOT HERE BE DETERMINED, IT IS NOT A MATTER OF THE STATE'S GRACE AND A PERSON CANNOT BE BARRED EXCEPT FOR VALID REASONS" and only then in accordance with due process Schware v Board of Bar Examiners 353 U.S. 232 Notes A & D (1957) Cleveland Board of Education v Loudermill 470 U.S. 532, 533 (1985).

Respondent(s) ALLEGED evidence that racial discrimination was not the reason or part of the reason for nonrecertification (nontenure) was respondents(s) verbal justification, UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL, that "I believe at that point in time that two

out of the six or seven that were not recertified were minority -- black minority" (T. Tr p27) and the ALLEGED verbal fact, UNSUPPORTED BY THE WRITTEN PEER REVIEW MATERIAL that a Black supervisor ALLEGLY participated in the AD HOC meeting (T. Tr p17, 29; Pet. for Cert., p B9-B10), and the secret factors, unrevealed to plaintiff, which were considered by respondent(s) in violation of Independent Meat Packers Association v Butz 526 F2d 228, 239 Note 30 (8th Cir 1975) cert. denied 424 U.S. 361 U.S. 966 In re Ruffallo 390 U.S. 543, 550 (1968) Stirone v U.S. 361 U.S. 212.

Plaintiff requested disclosure of the written peer review material because "IF THERE IS A "SMOKING GUN' TO BE FOUND THAT DEMONSTRATES DISCRIMINATION IN TENURE DECISIONS, IT IS LIKELY TO BE

TUCKED AWAY IN PEER REVIEW FILES" and the "FACT THAT BLACK SUPERVISOR WAS INVOLVED IN DECISION TO TERMINATE BLACK EMPLOYEE DID-NOT PRECLUDE FINDING OF RACIAL DISCRIMINATION" id. University of Pennys, In Re Lewis (6th Cir 1988) Rehearing and Rehearing En Banc Denied 6-29-88.

Further, Respondent(s) actions were a "SELECTED PROSECUTION OF PLAINTIFF IN VIOLATION OF HIS RIGHT TO DUE PROCESS, because "MR. SUTTON WAS THE ONLY ONE THAT YOU DIDN'T RECERTIFY WHO HAD NO PROBLEM WITH HIS PERFORMANCE AS AN APPRAISOR; ISN'T THAT CORRECT ? -- YES SIR. THAT'S CORRECT." (T Tr p28; Defendant Answer 1 to Plaintiff's First Set of Intorrogatories)

THE DISTRICT COURT DID-NOT RULE ON THE DUE PROCESS ISSUE (Pet. for Cert. p A9, Footnote 3).

Instead, the District Court did the same thing as the Appeal Court, and that was to conduct a "de-nova" review of respondent(s)'s decisionmaking reasoning.

The parties to this action DID-NOT and CAN-NOT consent to said "de-nova" review, and THE LOWER COURTS WERE NOT EMPOWERED TO CONDUCT SAME TO "JUSTIFY" RESPONDENTS ACTION (Plaintiff's "Motion in Liminee" filed in District Court 11/9/87; T Ph p 37) id. Independent Meat Packers, id. In re Rufallo, id. Stirone v U.S.

Disclosure of respondent(s) peer review material was a NECESSARY REQUIREMENT, if the District Court was to conduct a judicial review of the Administrative Agency decision to deny recertification (tenure) id. University of Pennys, Missouri Teacher Tenure Act

V.A.M.S. 168.104 (Op. Atty. Gen. No. 233, Holliday 10-24-72).

The recertification system operated by respondent(s) is an unconstitutional prior restraint, in violation of due process, because it gives respondant(s) unlimited discretion to nonrecertify and/or terminate members of the fee appraisal panel in violation of FW/PBS, Inc. v Dallas (No. 87-2012) decided January 1990, Kolender v Lawson 461 U.S. 352 (1983) Standard Airlines v Civil Aeronautics Board 177 F2d 18, 20, Notes 1-3 (D.C. Cir 1949) id. Missouri Teacher Tenure Act.

"WHERE AN ACT TO BE PERFORMED BY a court or OTHER AUTHORITY WILL ESPECIALLY AFFECT A PARTICULAR INDIVIDUAL, REASONABLE NOTICE SHOULD BE GIVEN TO HIM, SO THAT HE MAY APPEAR AND BE HEARD, EVEN THOUGH THE GIVING OF NOTICE IS NOT

REQUIRED BY STATUTE, and that, WHERE STATUTE CONFERS POWER ON a judicial or AN ADMINISTRATIVE AGENCY TO RENDER A JUDGEMENT OR MAKE AN ORDER AFFECTING RIGHTS OF PERSONS OR PROPERTY, AND NO PROVISION IS MADE FOR NOTICE, THE COURT WILL REQUIRE A REASONABLE NOTICE". 66 Corpus Juris Secundum (C.J.S.) "Notice Section" 14, p 652); Hoppe, Inc. v St. Louis Public Co. 361 Mo. 402, 235 S.W. 2d 347 (Mo. Banc 1951); id. Cleveland Board of Education v Loudermill.

PETITIONER'S AFFIDAVIT OF SERVICE OF REPLY BRIEF TO THE RESPONDENTS ANSWER TO THE PETITION OF CERTIORARI

Upon Respondent(s) and upon Solicitor General, Department of Justice, Washington D.C. 20530.

I, the undersigned petitioner do solemnly state on oath of affirmation that I have served a copy(ies) of subject Writ of Certiorari, in accordance with "Rules of the Supreme Court of the Unites States(Adopted April 14, 1980; Effective June 30, 1980; Including Revisions of November 21, 1980) on the Solicitor General, Department of Justice at the above noted address and to Respondent(s) Attorney Joseph B. Moore, Assistant U.S. Attorney, at his office 1120 Market

Street-Suite 414, St. Louis, Missouri 63101 on this 21st day of January 1990. Said service to the Solicitor General and To the U.S. Attorney was done by certified mailing thru the U.S. Postal Service return Receipt requested.

Emerson Sutton
2141 Yale
Maplewood, Missouri 63143
(314) 781-2222

Subscribed and sworn to before me this 21st Day of January 1990.

Notary Public
State of Missouri
County of St. Louis

My Commission Expires APRIL 11, 1992